**LIM JIT KIM & ORS**

**v.**

**GOH SIEW KOON & ORS**

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[COMPANIES (WINDING-UP) NO: 28-38-2001]
20 SEPTEMBER 2005

***COMPANY LAW:*** *Winding-up - Petition - Withdrawal of - Whether there is specific rule in Companies Act 1965 or Companies (Winding-Up) Rules 1972 to govern withdrawal of petition which has yet to be served and for which there was no advertisement - Whether English principles on withdrawal of petition applicable in Malaysia*

***COMPANY LAW:*** *Winding-up - Petition - Multiplicity or duplicity of petitions - Whether court can dismiss one of the petitions*

The petitioners had requested to withdraw this petition. Meanwhile, the petitioners presented the second petition in this court with substantially similar facts against the respondents, without serving the first petition on any of the respondents.

The 7th respondent applied by way of notice of motion in encl. (28) for an order that: (1) the petitioners' request to withdraw this petition ("the withdrawal") be set aside; (2) in the alternative, the withdrawal be varied to include the following terms: (a) that the petitioners should not re-file any petition based on the same or similar facts as the present petition; (b) that the petitioners should not raise, in any other legal suit or proceedings, the same or similar facts as set out in the present petition; (c) that the petitioners should pay the costs of the petition and of all applications filed by the party in the present petition on a solicitors and own client basis; (d) that the proceedings in the Companies (Winding-Up) Petition No MT1-28-23-2004 ("the second petition") be stayed: (i) until the costs in para (c) above had been taxed and fully paid by the petitioners to the 7th respondent; and (ii) until the final disposal of the respondents' action for damages provided that the action for damages is filed within six months from the date of this order. It was argued for the 7th respondent that the withdrawal was filed with the ulterior motive to obtain a collateral advantage as there was duplicity of winding-up petitions and in view of the death of the 13th petitioner.

It was common ground that there is no rule in Malaysia regulating the procedure for filing a withdrawal. It was noted that in England, where a petitioner desires to withdraw a petition before service or advertisement, he may lodge in chambers a request to withdraw in Form 49 prescribed in the English Companies Act 1948. Form 49 specifically applies where the petition "has not been advertised (or served)" (*Atkin*'s Vol. 10, *supra*). Therefore, the learned judge had to consider whether to apply Form 49 pursuant to the inherent powers of the court under O. 92 r. 4 and make an order as might be necessary to prevent injustice or to prevent an abuse of the process of the court.

**Held (allowing the withdrawal but subject to the terms in prayers 2(a) and (d)(i) of the notice of motion in encl. (28)):**

**[1]** In our jurisdiction there is no specific rule in the Companies Act 1965 ("the 1965 Act") or the Companies (Winding-Up) Rules 1972 ("the 1972 Rules") to govern the withdrawal of a petition which has yet to be served and for which there has been no advertisement.

**[2]** Order 92 r. 4 was considered in the judgment of the Court of Appeal delivered by Mahadev Shankar JCA (as he then was) in the *Fairview Schools* case where his Lordship observed that where the 1972 Rules make specific provisions for a particular matter, it would exclude parallel provisions in the rules of the court but where the 1972 Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provisions exists. If not, it can always resort to O. 92 r. 4. Therefore, the court took the proactive step by adopting and applying the procedure as contained in Atkin's Vol. 10 and thus held that the withdrawal did not run foul of the procedure nor was it fundamentally flawed.

**[3]** The death of the 13th petitioner would bring about the survival of the petition for the benefit of his estate: s. 8(1) of the Civil Law Act 1956. Further, O. 15 r. 7(1) where relevant, provides that if a party to an action dies but the cause of action survives, the action shall not abate by reason of the death. The withdrawal would appear to give the petitioners a collateral advantage *ie*, by dispensing with the need for devolution of the petition upon the estate of the 13th petitioner under s. 8(1) and O. 15 r. 7(1).

**[4]** There are no provisions made under the 1972 Rules and the Rules of the High Court 1980 to regulate the withdrawal. The court therefore invoked O. 92 r. 4, having regard to the Court of Appeal judgment in *Fairview Schools*. In order to prevent injustice or to prevent an abuse of the process of the court, by way of analogy the learned judge applied the principles set out in the judgment of Lim Beng Choon J in *Hanhyo Sdn Bhd*, *ie*, to allow the withdrawal subject to terms.

**[5]** Even if the petitioners had chosen not to withdraw the petition herein, there would have been a multiplicity or duplicity of petitions, in which case there would have been a need for the court to invoke the additional powers by dismissing one of the petitions, under para 11 in the Schedule to the Courts of Judicature Act 1964.

**Case(s) referred to:**

*Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 2 MLJ 423* ***(refd)***

*Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684 HC* ***(refd)***

*Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan [2002] 3 CLJ 370 CA* ***(refd)***

*Overseas Union Finance Ltd v. Lim Joo Chong [1971] 2 MLJ 124* ***(refd)***

*Saipem (M) Sdn Bhd & Anor v. AG & P (M) Sdn Bhd (In liquidation) & Ors [1996] 1 MLJ 239* ***(refd)***

*Fairview Schools Bhd v. Indrani Rajaratnam & Ors (No 1) [1998] 1 CLJ 285 CA* ***(refd)***

*Yong Siew Choon v Kerajaan Malaysia [2003] 2 CLJ 106 CA* ***(refd)***

**Legislation referred to:**

Civil Law Act 1956, s. 8(1)

Rules of the High Court 1980, O. 15 r. 7(1), O. 18 r. 19, O. 21 r. 2(1), 3, O. 92 r. 4

Companies (Winding-Up) Rules 1972, O. 15 r. 7(1)

**Other source(s) referred to:**

Alex Chang Huey Wah, *Companies Winding-Up Handbook (2003)*, p 121I, item 27

*For the respondents - Lim Kian Leong (Tan Shin Shin with him); M/s Lim Kian Leong & Co*

*For the petitioners - SP Chandra; M/s SF Pang & Chandra*

*Reported by Amutha Suppayah*

## JUDGMENT

**Low Hop Bing J:**

**Application**

This is the 7th respondent's application by way of notice of motion in encl. (28) for an order that:

1. the petitioners' request to withdraw this petition ("the withdrawal") be set aside;

2. in the alternative, the withdrawal be varied to include the following terms:

   (a) that the petitioners should not re-file any petition based on the same or similar facts as the present petition;

   (b) that the petitioners should not raise, in any other legal suit or proceedings, the same or similar facts as set out in the present petition;

   (c) that the petitioners should pay the costs of the petition and of all applications filed by the party in the present petition on a solicitors and own client basis;

   (d) that the proceedings in the Companies (Winding-Up) Petition No MT1-28-23-2004 ("the second petition") be stayed:

      (i) until the costs in para (c) above had been taxed and fully paid by the petitioners to the 7th respondent; and

      (ii) until the final disposal of the respondents' action for damages provided that the action for damages is filed within six months from the date of this order; and

   (e) such other order as this court deems fit.

**Factual Background**

The affidavit in support of this application was affirmed by one Tey Liong Seng, a director of the 7th respondent. The allegations of fact revealed that the petitioners had requested to withdraw this petition.

Meanwhile, the petitioners (except the 13th petitioner who is now deceased) have presented the second petition in this court with substantially similar facts against the respondents herein, without serving the first petition on any of the respondents.

The respondents (except respondent 6) had on 16 June 2004 filed an unsealed application by way of notice of motion to strike out the second petition. The petitioners had filed the withdrawal herein on the same date.

For brevity and convenience, all references hereinafter to an order and a rule are references to that order and rule in the Rules of the High Court 1980.

**Procedure For Withdrawal**

It was submitted by learned counsel Mr Lim Kian Leong, Miss Tan Shin Shin assisting him, that the withdrawal is invalid as there is no rule in Malaysia regulating the procedure for filing it and that, even if there is, the withdrawal must be filed with leave of the court. Reference was made to *Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd* [1989] 2 MLJ 423 HC; and *Saipem (M) Sdn Bhd & Anor v. AG & P (M) Sdn Bhd (In liquidation) & Ors* [1996] 1 MLJ 239 HC.

Mr. S.P. Chandra, learned counsel for the petitioners, contended, *inter alia*, that:

1. the instant application is an abuse of the process of the court and without any merit, as the first petition had neither been served nor advertised; and

2. in the absence of specific rules in Malaysia, the court should apply the procedure in England, ie, by filing a "Request to Withdraw Petition", relying on Vol. 10 of *Atkin's Encyclopaedia of Court Forms in Civil Proceedings* p. 82 Item 5 and p. 232 Form 49 ("Atkin's Vol. 10"); *Fairview Schools Bhd v. Indrani a/p Rajaratnam & Ors (No. 1)* [1998] 1 CLJ 285 CA; O. 21 r. 2(1) and O. 92 r. 4 of the Rules of the High Court 1980.

In my view, the above submissions appear to have reached the common ground that in our jurisdiction there is no specific rule in the Companies Act 1965 ("the 1965 Act") or the Companies (Winding-Up) Rules 1972 ("the 1972 Rules") to govern the withdrawal of a petition which has yet to be served and for which there had been no advertisement.

In *Companies Winding-Up Handbook (2003)* by Alex Chang Huey Wah, ("Alex Chang's Handbook") the learned advisory editor sets out at p. 121I, item 27 the steps to be taken where the petitioner desires to withdraw a petition before advertisement ie, the petitioner issues a notice of motion and, if necessary, an affidavit in support of the grounds for the withdrawal of the petition.

There is no dispute that in our jurisdiction, the 1965 Act and the 1972 Rules do not prescribe any Form for the purpose as stated in Alex Chang's Handbook, since there is no rule providing for the withdrawal of the petition in the circumstances prevailing herein.

However, in England, where a petitioner desires to withdraw a petition before service or advertisement, he may lodge in chambers a request to withdraw in Form 49 prescribed in the English Companies Act 1948. Form 49 specifically applies where the petition "has not been advertised (or served)" (Atkin's Vol. 10, *supra*).

In the circumstances, it behoves me to consider whether Atkin's Vol. 10 or Alex Chang's Handbook is to be preferred.

The procedure in England as contained in Atkin's Vol. 10 and the statement included in Alex Chang's Handbook reveal two conspicuous differences *viz.*

1. Form 49 is an integral part of the English Companies Act 1948, while there is no such Form in our 1965 Act; and

2. Form 49 includes an alternative situation where the petition has not been served, while item 27 appears to be confined to the "before advertisement" situation and does not appear to cover the "before service" situation.

The submissions by the respective learned counsel do not seem to dispute that the English Companies (Winding-Up) Rules and our 1972 Rules are substantially the same. As Form 49 has been prescribed in the English Companies Act 1948, I must consider whether I should apply Form 49 pursuant to the inherent powers of the court under O. 92 r. 4 and make an order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

Order 92 r. 4 was considered in the judgment of the Court of Appeal delivered by Mahadev Shankar JCA (as he then was) in *Fairview Schools*, *supra*, at p. 106I. His Lordship observed that where the 1972 Rules make specific provisions for a particular matter, it would exclude parallel provision in the rules of the court but where the 1972 Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provision exists. If not, it can always resort to O. 92 r. 4.

As the 1972 Rules do not make specific provisions for the withdrawal before me, I shall ascertain the position in the Rules of the High Court 1980.

Under O. 21 r. 2(1), in an action begun by writ, the plaintiffs may, without leave of the court, discontinue the action or withdraw any claim made by him, not later than 14 days after the service of the defence on him. This is effected by serving a notice in Form 36 to that effect on the defendant concerned. However, Form 36 read with O. 21 r. 2(1) do not provide for the procedure regulating the withdrawal of the instant petition.

For purposes of completeness, I must state that my consideration of the authorities cited for the 7th respondent shows that *Ansa Teknik (M) Sdn Bhd, supra,* is not an authority in which the issue of withdrawal has been ventilated for judicial determination. The application for consideration by LC Vohrah J (as he then was) concerns the striking out of a winding-up petition under O. 18 r. 19.

Next, the relevant portion of the judgment in *Saipem (M) Sdn Bhd & Anor, supra,* concerns the withdrawal of the claims under O. 21 r. 3(1), which is not relevant to the issue before me.

On the foregoing grounds, I would take the proactive step by adopting and applying, which I hereby do, the procedure as contained in Atkin's Vol. 10. Hence, I hold that the withdrawal has not run foul of the procedure, neither is it fundamentally flawed.

**Discontinuance In Non-petition Cases**

Various authorities have been cited for the parties in connection with discontinuance in non-petition cases.

It was argued for the 7th respondent that the withdrawal was filed with ulterior motive to obtain a collateral advantage:

1. as there was duplicity of winding-up petitions, citing *Overseas Union Finance Ltd. v. Lim Joo Chong* [1971] 2 MLJ 124 HC; *Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors* [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684 HC; and *Majlis Peguam Malaysia & Ors v. Raja Segaran a/l S Krishnan* [2002] 3 CLJ 370 CA; and

2. in view of the death of the 13th petitioner, seeking support in s. 8(1) of the Civil Law Act 1956; and *Yong Siew Choon v. Kerajaan Malaysia* [2003] 2 CLJ 106 CA.

It was contended for the petitioners that in the absence of any procedure in the 1972 Rules, O. 15 r. 7(1) should apply without having to add the personal representative of the 13th petitioner.

In the first place, I find that the judgment of the Court of Appeal in *Yong Siew Chin, supra,* was in respect of the interpretation of O. 15 r. 6A(1) and (4). The facts and circumstances there have nothing to do with the withdrawal before me.

On my part, I would observe that applications for discontinuance in non-petition cases such as originating summons and writ action had been dismissed where these applications had been tainted with ulterior motive for the purpose of obtaining a collateral advantage and the particular proceedings had matured to an advanced stage. There are two authorities to illustrate this proposition.

First, *Overseas Union Finance Ltd, supra,* which concerns an application by way of summons-in-chambers for an order that the chargee be at liberty to discontinue the charge action commenced by way of an originating summons. Various affidavits have been exchanged after the service of the originating summons by the chargee on the chargor. The chargee's ground for discontinuance was that there would be difficulty in selling the property as its value has fallen. In dismissing the application for discontinuance, Raja Azlan Shah J (now HRH the Sultan of Perak) held that the chargor was not to be deprived of the advantage in that there were flaws in the chargee's allegations *viz* the wrong dates in the memorandum of the agreement for the loan, and that the reason for wanting a discontinuance was not a very strong one.

Next, the Court of Appeal in *Majlis Peguam Malaysia, supra,* in the judgment delivered by Gopal Sri Ram JCA held, *inter alia,* that a judge exercising his power under O. 21 r. 3 which permits discontinuance has a wide discretion based on important guidelines, one of which is that where the case is at a very advanced stage, care should be taken not to permit discontinuance. There the Bar Council was the defendant. It had been put to great expense and trouble to test the rights of the plaintiff to bring the action in the first place, and had fought on the facts and law at the trial of the preliminary issue tooth and nail. In the circumstances, the Court of Appeal allowed the appeal by the Bar Council against the decision of the trial judge who had permitted the plaintiff's discontinuance. The Court of Appeal further stressed that it all depends on the facts and circumstances of each case.

Our courts have also allowed discontinuance but subject to terms.

In *Hanhyo Sdn Bhd, supra,* Lim Beng Choon J (as he then was) in granting leave to the plaintiff to discontinue his action against the first defendant, subject to certain conditions, held that the court would not compel a plaintiff to continue his action against a defendant if he does not want to do so provided no injustice is caused to the defendant and injustice would be caused to the defendant if:

(a) the discontinuance was made with ulterior motive to obtain a collateral advantage;

(b) the discontinuance was not made *bona fide* by the plaintiff but was made in order to obtain an advantage which he has no right to retain since he has ceased to be dominus litis as the defendant has a perfectly good defence; or

(c) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation.

The above decision has been approved by the Court of Appeal in *Majlis Peguam Malaysia, supra.*

Reverting to the facts herein, it is to be noted that the death of the 13th petitioner would bring about the survival of the petition for the benefit of his estate: s. 8(1) of the Civil Law Act 1956. Further, O. 15 r. 7(1) where relevant, provides that if a party to an action dies but the cause of action survives, the action shall not abate by reason of the death.

The withdrawal would appear to give the petitioners a collateral advantage ie, by dispensing with the need for devolution of the petition upon the estate of the 13th petitioner under s. 8(1) and O. 15 r. 7(1).

On the basis of the above submissions, I find that no provision has been made under the 1972 Rules and the Rules of the High Court 1980 to regulate the withdrawal. I therefore invoke O. 92 r. 4, having regard to the Court of Appeal judgment in *Fairview Schools Bhd, supra*. In order to prevent injustice or to prevent an abuse of the process of the court, by way of analogy I apply the principles set out in the judgment of Lim Beng Choon J in *Hanhyo Sdn Bhd, supra,* ie, to allow the withdrawal subject to terms.

Further, it is pertinent to observe that even if the petitioners had chosen not to withdraw the petition herein, there would have been a multiplicity or duplicity of petitions, in which case there would have been a need for me to invoke the additional powers by dismissing one of the petitions, under para 11 in the Schedule to the Courts of Judicature Act 1964 which, where relevant, reads as follows:

> 11. Power to dismiss … proceedings … where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued.

**Other Issues**

Consideration of the above submissions is in my view adequate to enable me to arrive at a definitive decision in relation to this application. I therefore express my gratitude to the respective learned counsel for their efforts in raising other issues which upon perusal would require no further analysis by me.

**Conclusion**

In the circumstances, I allow the withdrawal but subject to the terms in 2(a) and (d)(i) of the above alternative prayers of the 7th respondent's notice of motion in encl. (28), with reasonable costs to be taxed by the learned registrar of this court.